In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 77-1809

SEDALIA-MARSHALL-BOONVILLE STAGE LINE, INC.,
Petitioner,

vs.

NATIONAL MEDIATION BOARD

and

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,
Respondents.

MOTION OF COMMUTER AIRLINE ASSOCIATION OF AMERICA FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE AND BRIEF OF COMMUTER AIRLINE ASSOCIATION OF AMERICA AS AMICUS CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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MOTION OF COMMUTER AIRLINE ASSOCIATION OF AMERICA FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE

Pursuant to Rule 42 of the United States Supreme Court, the Commuter Airline Association of America respectfully moves this Court for leave to file the accompanying Amicus Curiae brief.

The consent of the attorney for the Petitioner herein, as well as the consent of the attorney for the Respondent National Mediation Board, has been obtained, but the attorney for the Respondent International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America has refused to consent to the filing of a brief by the Commuter Airline Association of America as Amicus Curiae.

The Commuter Airline Association of America, and its approximately 100 commuter air carrier members, are vitally concerned with the basic issue presented in SMB's petition for writ of *certiorari*. At issue are the National Mediation Board procedures for investigation of representation disputes under the Railway Labor Act, 45 U.S.C. 151, *et seq*.

In its brief, Petitioner has directed its argument primarily to the failure of the National Mediation Board to meet its statutory duty to investigate issues arising in a representation dispute. While Petitioner has addressed the constitutional issue, the Amicus Brief more fully addresses the issue and its effect on the industry as a whole. The constitutional arguments made in the Amicus Curiae brief are central to the disposition of this matter and will not otherwise be fully set forth before this Court. If this argument is approved by this Court, the decision of the courts below must be reversed.

Respectfully submitted,

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BRIEF OF COMMUTER AIRLINES ASSOCIATION OF AMERICA AS AMICUS CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

INTEREST OF AMICUS CURIAE

The Commuter Airlines Association of America ("CAAA") is a trade association whose regular members are comprised of a commuter air carrier as defined and classified in Part 298 of the Civil Aeronautics Board's Economic Regulations. Petitioner Sedalia-Marshall-Boonville Stage Line, Inc. ("SMB") is a CAAA member. The ap-

proximately 100 CAAA members operate throughout 48 of the states of the union and in its territories and virtually all members are subject to the Railway Labor Act, 45 U.S.C. 151, *et seq.*[1]

CAAA members are vitally concerned with the issues presented in SMB's petition for writ of *certiorari*. At issue are the National Mediation Board ("NMB") procedures for investigation of representation disputes under the Railway Labor Act and the extent to which there may be judicial review of NMB determinations. The NMB in this case, without notice or opportunity for SMB to be heard, excluded three employees from participation in a representation election. There was a one-vote margin in the election and the votes of the three employees excluded from eligibility could affect the results of the election.

The facts of this case reveal a breach of the NMB's duty to investigate the representation dispute and a denial of fundamental due process and this concerns and could affect each CAAA member subject to the representation procedures of the Railway Labor Act.[2]

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1. CAAA members play an increasingly vital role in domestic, territorial and international air commerce. The growth of the commuter industry is reflected in the fact that commuter traffic increased from four million two hundred and sixty-nine thousand six hundred and three (4,269,603) passengers in calendar year 1970, to eight million five hundred thousand (8,500,000) passengers in the calendar year 1977, an average annual rate of growth well in excess of 10%. The commuter carriers operate in 1,469 passenger markets and serve 747 airports. Aviation Daily, Vol. 237, Nos. 31 & 43, pp. 245-46, 343 (1978).

2. After the application for representation was filed, SMB cooperated with the NMB by providing it with a list of its pilots and copilots and supplying information regarding the duties of certain pilots pursuant to inquiries by the NMB. (R.53-54). No inquiries were made regarding Messrs. Barber, Milner or Worden; nor was SMB informed of any issues regarding them. (R.9, 54-55).

After the election was held, SMB discovered that 9 pilots' names had been stricken from the eligibility list and two former

(*Continued on following page*)

The district court below was not satisfied with its decision and Judge Stewart frankly so stated:

> The Court is not satisfied with the result it feels compelled to reach under the authorities. Defendants state that at the present time we are not "in tune" with the circumstances existing when the Railway Labor Act created the NMB. *I believe it is more accurate to state the NMB's authority and procedures are out of tune with the realities of modern day labor-management relationship and current due process concepts.* Had standing been shown, serious due process questions would have been presented. Perhaps Congress or the appellate courts will take steps to remove this anachronism. *See*, the chastisement of the NMB in *International In-Flight Catering Co., Ltd.* v. *National Mediation Board*, decided by the Ninth Circuit June 10, 1977. (Emphasis supplied).

Footnote continued—

pilots had been added. Among the 9 were Messrs. Barber, Milner and Worden. (R.54).

SMB promptly protested the election on the grounds that certain employees had been declared ineligible and other former employees declared eligible, without notice or an opportunity for SMB to be heard. (R.36). The NMB cursorily responded that the protest was untimely and that SMB was not a party to the proceedings. (R.37-39).

SMB then filed a written application with the NMB seeking vacation of the certification and an investigation regarding the eligibility of employees Barber, Milner, Worden and Reaves, and former employee Shaw, setting forth facts supporting their requests. (R.43). The NMB responded that the application was denied in "executive session", that its original determination regarding the employees was proper, and that while Shaw had been improperly included, he had not cast a ballot and the outcome of the election was therefore not affected by the error. (R.47).

Before instituting a suit in District Court, SMB tried unsuccessfully to obtain information regarding the NMB's investigation. (R.58-59). In its answer to the suit, however, the NMB admitted that it had *no* facts from any source supporting its decision regarding Messrs. Barber, Milner and Worden and that it had summarily denied SMB's post-election application. (R.9, 59).

Neither was the Court of Appeals satisfied with the decision. Noting its agreement with Judge Stewart, the Court of Appeals further declared that:

> *It is unfortunate that the statutes, and cases interpreting them, permit such unilateral and arbitrary imposition of a union upon a carrier without a hearing of any sort.* The protections afforded a noncarrier employer by the National Labor Relations Act are much to be preferred. But the responsibility to make that decision rests with Congress and not this Court.

574 F.2d 394, 399, f.n. 5 (8th Cir. 1978) (Emphasis supplied).

The "statutes and cases interpreting them" do not permit unilateral and arbitrary imposition of a union upon a carrier without a hearing of any sort. The Railway Labor Act and the Fifth Amendment do not stand for this proposition. CAAA urges that this Court grant review, in order to clarify that rail and air carriers are entitled to basic procedural due process rights in NMB determinations of such importance as those involved in the case at bar.

There is no doubt that the principles of law involved in this case far transcend the effect on SMB and affect each air and rail carrier subject to the Railway Labor Act. If the NMB is permitted to continue a procedure of deciding potentially determinative issues without any notice or opportunity for carriers to be heard, then the situation will continue to exist wherein a union may be unilaterally and arbitrarily imposed upon a carrier and its employees without affording to them any of the currently accepted principles of due process, a situation considered *unsatisfactory* by the District Court below and *unfortunate* by the Court of Appeals.

ARGUMENT

I. The Case at Bar Creates a Conflict in the Circuits.

The decision in this case by the Court of Appeals for the Eighth Circuit is in direct conflict with the recent decision of the Court of Appeals for the Ninth Circuit in *International In-Flight Catering Company, Ltd.* v. *NMB*, 555 F.2d 712 (9th Cir. 1977).

The Ninth Circuit, in *In-Flight Catering*, has adopted a standard of review under the Railway Labor Act which permits judicial inquiry into the merits of the case in order to determine whether the NMB has fulfilled its statutory duty to investigate a representation dispute.

The Eighth Circuit, on the other hand, in the case at bar, adopted a very limited standard of review which requires that there be a "gross violation" of the NMB's statutory duty to investigate before it can review a certification or otherwise interfere with NMB processes and decisions. 574 F.2d 394 (8th Cir. 1978).

The Eighth Circuit's restrictive scope of review under the Railway Labor Act is unwarranted and CAAA urges this Court to resolve this conflict between the circuits.[3]

SMB has fully addressed this issue in its petition and CAAA, therefore, does not specifically address the issue here. CAAA does, however, fully support the position set forth by SMB.

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3. CAAA does not concede that the instant case does not call for judicial review even under the Eighth Circuit's restrictive standard for review. The record evidence reveals an egregious set of circumstances fully justifying a conclusion of gross violation of the NMB's statutory duty to investigate.

II. The Court of Appeals' Decision in the Case at Bar Raises Substantial Constitutional Questions.

The crucial constitutional issue raised in this case is the extent to which a carrier is entitled to due process in the NMB's representation dispute proceedings. By affording the appropriate due process protections to carriers in such proceedings, the NMB's compliance with its statutory duty to investigate issues in representation disputes will be virtually assured.

The court below ruled that SMB was not entitled to any Fifth Amendment procedural due process rights in the NMB's eligibility determinations, and therefore not entitled to notice and an opportunity to be heard. 574 F.2d at 396. We demonstrate below that inasmuch as such NMB determinations can and do substantially affect a carrier's liberty and property, the decision marks a significant departure from this Court's long standing due process decisions and should be reviewed. *See, e.g., Goldberg* v. *Kelly*, 397 U.S. 254, 25 L.Ed. 2d 287 (1970); *Den* v. *The Hoboken Land and Improvement Co.*, 18 How. 277, 59 U.S. 277, 15 L.Ed. 372 (1855).

A. The Due Process Clause of the Fifth Amendment Prohibits the Federal Government From Depriving Any Person of Life, Liberty or Property Without Affording That Person With the Appropriate Protections Traditionally Associated With Justice and Fairness.

We begin with the root proposition that the Due Process Clause of the Fifth Amendment to the Constitution of the United States is a restriction upon the powers of all three branches of the Federal Government—Legislative, Executive and Judicial—as well as upon any administrative agencies created by those branches to implement and enforce their laws, orders or decisions, when the exercise of such powers may result in a denial of any person's life, liberty and property. *See, e.g., Den* v. *The Hoboken Land and Improvement Co., supra.*

The requirements of "due process" cannot be succinctly or categorically stated; nor can they be mechanically applied. The requirements in any given situation vary with the nature of that situation, due process being a flexible concept. *See, e.g., Mathews* v. *Eldridge*, 424 U.S. 319, 47 L.Ed. 2d 18 (1976); *Hannah* v. *Larche*, 363 U.S. 420, 3 L.Ed. 2d 1307 (1960).

Relevant to a determination of the extent and nature of the requirements of due process in a particular case are such factors as (1) the nature of the alleged right involved, (2) the length of the possible deprivation, (3) the risk of an erroneous deprivation of the interest involved, (4) the nature of the proceeding, and (5) the government's interest including the fiscal and administrative burdens that the additional or substitute procedural requirement(s) would entail. *See, Mathews* v. *Eldridge, supra*; *Fusair* v. *Steinberg*, 418 U.S. 379, 42 L.Ed. 2d 521 (1975); *Hannah* v. *Larche, supra.*

Generally speaking, when the governmental action is administrative in nature, the proceedings need not precisely follow the judicial model of an evidentiary hearing. *See, e.g., Joint Anti-Fascist Committee* v. *McGrath*, 341 U.S. 123, 95 L.Ed. 817 (1950) (Frankfurter, J., concurring). Moreover, just as the requirements applicable to an administrative proceeding can differ from those applicable to a judicial proceeding, the due process requirements can also vary with the nature of the particular administrative proceeding involved, and whether the administrative action is adjudicatory or regulatory in nature is important in determining the nature and extent of the due process

protections required. Where the administrative function is adjudicatory, applying set standards to an individual case, the due process requirements are more stringent than where a rulemaking function, which sets standards generally applicable to a class, is involved. *See, Goldberg* v. *Kelly, supra*, at 268, *Greene* v. *McElroy*, 360 U.S. 474, 496-97, 3 L.Ed. 2d 1377 (1959); *Provost* v. *Betit*, 326 F. Supp. 920, 921-22 (D. Vt. 1971).

Although the precise requirements of due process may vary from case to case, according to the various relevant factors described above, the fundamental requirement of due process is the right to be heard "at a meaningful time and in a meaningful maner." *Mathews* v. *Eldridge, supra*, at 333; *Armstrong* v. *Manzo*, 380 U.S. 545, 14 L.Ed. 2d 62 (1965). That right was denied in the case at bar.

B. Direct Interests of a Carrier in the Results of an NMB Resolution of a Representation Dispute Are Sufficient to Require That Due Process Be Afforded to the Carrier Before Any Final Administrative Decision Which May Affect Those Interests.

The range of rights and interests embodied in the concepts of life, liberty and property, and protected by the Due Process Clause has been broadly defined. *See, e.g., Board of Regents* v. *Roth*, 408 U.S. 564 (1972). It has been recognized that the property interests protected by the clause extend well beyond actual ownership of real estate, chattels, or money. *Board of Regents* v. *Roth, supra*. Similarly, "liberty" has been held to include the right to contract, and its meaning has been described as "broad indeed." *Board of Regents* v. *Roth, supra*; *Stanley* v. *Illinois*, 405 U.S. 645, 31 L.Ed. 2d 551 (1972); *Bolling* v. *Sharpe*, 347 U.S. 497, 98 L.Ed. 884 (1954).

In determining whether an aggrieved party has suffered a deprivation of a "protected interest," it is the nature and not the weight of the interest that is important, at least with respect to the threshold determination of whether due process of any kind is required, *Meachum* v. *Fana*, 427 U.S. 215, 49 L.Ed. 2d 451 (1976); *Board of Regents* v. *Roth, supra*, and the party claiming to be aggrieved must have some present, cognizable interest in the right claimed to have been deprived or to be subject to deprivation. *Board of Regents* v. *Roth, supra.*

A Railway Labor Act carrier faced with a representation dispute among some or all of its employees unquestionably faces substantial restrictions or deprivations of protected rights, and these rights can be and are affected by NMB decisions in craft or class and eligibility determinations.

The Court of Appeals below only noted that an NMB determination of one craft or class over another can impose an "additional" burden on the carrier, an imposition to which the court apparently ascribed little significance. 574 F.2d 394, 399. While it is true that a particular craft or class determination may impose only some "additional" burden on a carrier by including more employees in the craft or class than was originally anticipated, the effects can also be considerably more substantial. That is, by expanding or contracting the craft or class, the NMB's decision may well be determinative of the issue of whether the union has made the "showing of interest" necessary even to trigger the election process.[4] Similarly, the NMB's

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4. Where the employees are already represented, the application must be supported by a showing of proved authorizations by a majority of the employees. Where the employees are unrepresented, the required showing is only 35%. 29 C.F.R. Chapter X, §1206.2(a) & (b).

determinations with regard to the individual employee eligibility can have this same effect.

Decisions by the NMB regarding craft or class determinations and individual eligibility determinations can also have a determinative effect beyond whether or not a union has a showing of interest among employees. As in the case at bar, the NMB's decision finding three (3) employees ineligible to vote can result in a union obtaining a "majority" of the possible votes where it otherwise might not have obtained such a majority and would not have been certified.

In the above situations, the "burden" placed upon a carrier is substantially greater than that recognized by the Court of Appeals below. While in some situations the NMB's selection of one craft or class as opposed to another may add only an additional burden in that the carrier may be obliged to bargain concerning 125 employees as opposed to 100, *the situation can also be that the Board's determination is directly determinative of whether a union will receive certification at all.*

Unions are permitted to participate in representation dispute proceedings and, to that extent, have the opportunity to present evidence on appropriate craft or class determinations and on individual eligibility determinations. According to the Court of Appeals below, however, carriers may be denied this right. The NMB cannot be expected to reach a correct decision in these matters when it hears only from one interested party and does not afford the other side a chance to rebut the claims made.

The Court of Appeals below did not even consider the burdens placed on a carrier as the result of an NMB certification of a union as the bargaining representative. As this Court noted in *Brotherhood of Railway and Steamship Clerks* v. *Association for the Benefit of Non-Contract Employees*, 380 U.S. 650, 14 L.Ed. 2d 133 (1965) ("A.B.N.E."), it is true that the Railway Labor Act does not require a carrier to reach agreement with a certified union on any issue. *Virginia Ry. Co.* v. *System Federation*, 300 U.S. 515, 81 L.Ed. 789 (1936). Even so, however, a failure to reach an agreement can, in and of itself, result in severe losses to the carrier in terms of a loss of income, goodwill, etc. flowing from strikes and boycotts. *See, gen., International In-Flight Catering Company* v. *National Mediation Board, supra,* at 719.

In addition, while the carrier is not required to reach an agreement with any representative selected by its employees, it *is* prohibited from making any changes which relate to rates of pay, rules and working conditions unless and until it has satisfied the requirements of Section 6 of the Railway Labor Act (45 U.S.C. §§156, 182) by bargaining with the representative until it reaches either agreement or impasse. In the latter event, the parties are released by the NMB to resort to their respective economic strengths and while the carrier can then make the changes it wants, it must risk a strike or other work stoppage and the losses resulting therefrom in the process.

A myriad of items are covered by the phrase "rates of pay, rules and working conditions," including scheduling, work force size, subcontracting, selection of new equipment, crew complement and utilization of the work force and equipment, to name but a few. A restriction on any one of these areas has substantial impact upon the carrier's exercise of its liberty and property rights. In view of the highly competitive and progressive nature of the airline industry and the fact that it is "capital heavy," due process protections should be afforded to the carrier in any proceeding which may result in a deprivation or

restriction of the carrier's right to utilize its property as it deems necessary and proper.

A carrier also faces a deprivation or restriction of its liberty as a result of NMB determinations in a representation dispute proceeding. As this Court stated in *Board of Regents* v. *Roth, supra,* "liberty," as used in the Fifth Amendment, includes the right to contract freely and a deprivation of that right can be constitutionally affected only if due process is afforded to the aggrieved person. *See, also, Lynch* v. *United States,* 292 U.S. 571, 78 L.Ed. 1434 (1934). That the concepts of "liberty" and "property" include freedom in making contracts of employment, and that such freedom is "not to be struck down directly, or arbitrarily interfered with," is also well settled. *Prudential Insurance Co.* v. *Cheek,* 259 U.S. 530, 536, 66 L.Ed. 1044, 1051 (1921).

In the absence of a certified bargaining representative, a carrier is free to contract with its employees individually or on whatever basis it chooses. Moreover, it is free to alter the terms and conditions of the contracts if it deems a change to be desirable or necessary. Once a bargaining representative is certified, however, a carrier may no longer contract with its employees individually or on any other basis regarding "rates of pay, rules and working conditions" unless and until it either obtains the representative's agreement or is released by the Board to take unilateral action after impasse is reached. *See, e.g., Detroit and Toledo Shoreline Railroad Company* v. *United Transportation Union,* 396 U.S. 142, 24 L.Ed. 2d 325 (1969).

As if the above-discussed rights and interests alone were not sufficient to invoke the protections of due process, under the Railway Labor Act, a carrier also faces potential

criminal liability, otherwise nonexistent, for a violation of the bargaining obligations imposed upon it by certification of a collective bargaining representative. 45 U.S.C. §152, Tenth.

Thus, not only does a carrier face the necessary deprivation of life, liberty *or* property as a result of Board decisions in a representation dispute proceeding, but it faces possible deprivation of liberty *and* property, and is entitled to the protections of due process before a bargaining representative is certified.

C. The Representation Dispute Procedures Set Forth in the Railway Labor Act, As Implemented and Actually Applied by the National Mediation Board in This Case, Do Not Provide for the Due Process Protections Required by the Fifth Amendment.

While it is not doubted that the carrier in *A.B.N.E. may* have been afforded the due process protections required by the Fifth Amendment in that particular case, especially in view of the NMB extensive proceedings, the prior hearings in which the carrier was permitted to participate, and the amount of evidence actually submitted by the carrier and received and reviewed by the NMB, the result obtained in that case was a result of an administrative fiat and not any statutory or regulatory requirement or guarantee. The fact that the statute and administrative regulations are applied so as to comport with "any possible constitutional requirements" in one case does not establish the constitutional sufficiency of the procedures utilized in any other case, and no carrier is guaranteed to receive the protections that the carrier in *A.B.N.E.* received, as is evidenced by the case at bar.

In this case, there is no dispute regarding the pertinent facts. While SMB was informed of the existence of certain issues and given the opportunity to state and support its position regarding them, it was never informed of the resolution of, or even the existence of, other issues until the election process had been completed. While SMB protested this fact, the only response from the NMB was a self-serving and conclusory reaffirmation of the prior "eligibility decision". It presented no evidence to the trial court that it had taken any steps to actually investigate the issues, and, in fact, admitted that it had *no* evidence *from any source* establishing basic facts to support its decisions.

Even if SMB had been given an opportunity to present evidence after it requested reconsideration of the eligibility decisions in question, a postdetermination procedure affording an opportunity to be heard where such opportunity was denied originally does not satisfy due process in view of the additional burden of convincing the NMB to reverse its decision and set aside the already completed election which is placed on the carrier at the postdetermination stage. *See Armstrong* v. *Manzo, supra.*

Similarly, even if the NMB determination in the case at bar was correct, that fact cannot support a finding that there was no denial of due process. In *Fuentes* v. *Shevin,* 407 U.S. 67, 87, 32 L.Ed. 2d 556, 574 (1972), this Court stated that

> [t]he right to be heard does not depend upon an advance showing that one will surely prevail at the hearing. To one who protests against taking of his property without due process of law, it is no answer to say that in his particular case due process of law would have led to the same result because he had no adequate defense on the merits.

The constitutional defects of the NMB's discretionary investigative procedures in the case at bar are evident. With regard to the eligibility decisions in question, SMB was not afforded the opportunity to be heard "at a meaningful time and in a meaningful manner." *Mathews* v. *Eldridge, supra,* at 333. The only "meaningful" time is prior to the rendering of a decision on the issues, and to be heard in a "meaningful" manner requires, *a fortiori*, some *prior* notice of the existence of the issues as well as the assertions made by the opposing party regarding those issues. None of these protections were afforded to SMB, however, and, as a result, its freedom to contract and to utilize and manage its property has been and continues to be severely restricted.

While a consideration of the various factors declared by this Court to be important to a determination of whether sufficient due process has been afforded in a particular case is relevant to the question of the adequacy of, rather than the threshold question of the applicability of, due process, a consideration of these factors serves only to buttress the conclusion that SMB was denied due process.

As discussed above, a carrier faces substantial restriction or partial deprivation of its liberty and property rights in the NMB representation dispute proceedings, and these deprivations are of an indefinite and potentially permanent duration.[5]

Moreover, there is a substantial risk that the NMB will make an erroneous decision, as in the case at bar it was forced to admit to an error in one of the more

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5. Neither the Act nor the regulations explicitly provide for any decertification proceeding. As a result of the *A.B.N.E.* decision, however, it does appear that decertification can result in the limited situation where a second union challenges an incumbent union and less than a majority of the employees vote for both unions combined.

simplistic eligibility decisions that it made.[6] This risk of an erroneous deprivation of liberty or property rights becomes even more compelling when this Court's previous decision that such NMB determinations are not reviewable on their merits is considered. *Switchmen's Union of North America* v. *NMB*, 320 U.S. 297, 88 L.Ed. 61 (1943).

The only factor which could conceivably support the procedures used by the NMB in this case is the consideration of the government's interest and the burdens imposed on the government by requiring that due process protections be afforded to the carrier; and the governmental interest in expediency does not outweigh the right of a carrier to notice and an opportunity to be heard. In the Railway Labor Act, Congress gave instructions to the NMB that representatives should be certified within thirty (30) days of the invocation of its services. *A.B.N.E., supra*, at 668. However, this time restriction has never been recognized as a basis for a total denial of due process.

Even if Congress was enunciating a strong desire to resolve representation disputes expeditiously, this Congressional instruction should not be used to deny or restrict a carrier's rights to due process in view of the NMB's actual practice. It is doubtful, in recent years, that the NMB has ever had a year in which it certified election results within thirty (30) days of the filing of an application for representation in even a simple majority

6. The inadequacy of the current "fact finding" procedure is laid bare by this error since the issue involved in the admittedly erroneous determination was the employee in question's continued employment status. Had SMB been notified or consulted regarding this issue prior to the rendering of the original decision, the issue could have been quickly and correctly resolved in the first instance. If erroneous decisions occur in such simple issues, what assurance is there that more difficult issues involving factual questions such as job duties, functions and responsibilities can be correctly decided without the participation of the carrier, who has a more thorough knowledge of the facts than some outside union, person or organization.

of the cases handled. This observation is not meant as a criticism of the NMB, for it is submitted that this 30-day timetable is both unrealistic and unworkable in cases involving air and rail carriers, which very often involve hundreds, if not thousands, of employees in a single craft or class.[7]

Moreover, as many Railway Labor Act elections are conducted by mail ballot and allow at least three weeks for the voting process alone, it is easy to understand the impossibility of meeting the thirty-day timetable for reasons wholly unrelated to due process considerations. Mediator's Manual, §334.311.

That the thirty (30) day time frame is unrealistic in light of the NMB's actual practice is further evidenced by the case at bar. Here, the dispute involved a small, admittedly appropriate craft or class of approximately 60 employees. Nevertheless, the union was not certified until 71 days after the services of the Board were invoked.

Accordingly, apart from considerations of expediency, there are no other significant or undue burdens which would be placed on the NMB by holding that prior notice and an opportunity to be heard and to rebut evidence must be provided to the carrier, and that the NMB's decisions must contain basic findings of fact and supportive reasoning. The NMB currently incorporates notice and opportunity to be heard in some cases, without apparent difficulty, *see, e.g., Pan American World Airways, Inc.*, NMB File No. C-3712, Vol. 4, Determinations of Craft or Class, pp. 129, 130 (1967), and it should be required to do so in all cases.

7. Unlike the procedures under the Labor Management Relations Act, representation issues under the Railway Labor Act are handled on a system-wide basis and are not broken down on a smaller, fragmented basis. *Cf., Switchmen's Union, supra.*

III. The Court of Appeals Incorrectly Interpreted This Court's Prior Decisions As Holding That a Carrier Under the Railway Labor Act Is Not Entitled to Due Process of Law in Representation Disputes.

In spite of the foregoing considerations discussed in II, *supra*, the Court of Appeals below held that SMB was not entitled to due process and, thus, there was no denial of due process to SMB when the NMB did not notify the carrier of the existence of certain voting eligibility questions or give it the opportunity to be heard regarding those questions.

In so holding, the Court of Appeals stated a reliance upon this Court's opinion in *A.B.N.E.*, *supra*, at 666-667, quoting the following language therefrom:

> . . . the Act [does not] require that United [the carrier] be made a party to whatever procedure the Board uses to define the scope of the electorate. This status is accorded only to those organizations and individuals who seek to represent the employees, for it is the employees' representative that is to be chosen, not the carriers'. Whether and to what extent carriers will be permitted to present their views on craft or class questions is a matter that the Act leaves solely in the discretion of the Board. [Bracketed material supplied].

A. The Court of Appeals Misread the Holding by This Court in the *A.B.N.E.* Decision.

Although the Court of Appeals below viewed this Court's *A.B.N.E.* decision as a broad constitutional decision applicable to all NMB proceedings relating to representation disputes, it was actually decided based on its particular facts. Despite the language quoted by the Court of Appeals, this Court's holding was that

> [i]n view of these considerations, [the carrier's extensive participation among others], we hold that the Board performed its statutory duty to conduct an investigation and designate the craft or class in which the election should be held and that it did so in a manner satisfying any possible constitutional requirements that might exist. [Bracketed material supplied].

380 U.S. at 668, 14 L.Ed. 2d at 145.

The holding was not that the carrier was unentitled to any due process protections as the Court of Appeals interpreted it. Rather, the clear import of the holding was that, in view of the extensive carrier participation in the proceedings, the necessary protections, whatever they might be, had been afforded.

B. The Court of Appeals Ignored the Obvious and Substantial Factual Differences Between the Case at Bar and the *A.B.N.E.* Decision Upon Which It Relied.

As noted above, this Court apparently decided the *A.B.N.E.* case on its particular facts. In its decision in the case at bar, however, the Court of Appeals ignored the multitude of significant factual distinctions between the *A.B.N.E.* case and the case at bar, which distinctions made *A.B.N.E.* inapplicable to this case.

In *A.B.N.E.*, the carrier was challenging the craft or class determination rather than individual eligibility

issues as were challenged in the case at bar.[8] Moreover, the carrier in *A.B.N.E.* had participated extensively in prior NMB hearings involving the propriety of the craft or class challenged and, in fact, had been permitted to participate extensively in the very proceedings out of which its challenge arose. Thus, the carrier was not claiming that it had not been given notice or opportunity to be heard; rather, it was seeking a more formal hearing.

In the case at bar, on the other hand, SMB did not participate in and, in fact, did not even receive notice of, the investigation of eligibility questions involving several employees.

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8. Craft or class determination more closely resemble rule-making determinations than do individual eligibility determinations and *may* therefore require less stringent due process safeguards. *See Greene* v. *McElroy, supra.* It is CAAA's position, however, recognizing, of course, that no issues involving craft or class determinations are presented to this Court in the case at bar, that craft or class determinations are also adjudicative actions requiring substantial due process safeguards since they seek to apply general standards (e.g., communities of interest, functional integration, etc.) to particular individual cases. That the NMB itself views such determinations similarly can be seen from its own language in a craft or class determination rendered at almost the same time as this Court decided the *A.B.N.E.* case, to wit:

> The Board is cognizant of the fact that when it is dealing with controversies involving individuals functioning in a supervisory capacity, titles and responsibilities vary *accordingly to the internal organization of the Carrier.*
>
> * * *
>
> The Board recognizes changes in the dynamic and progressive airline industry, and although the Board may rely on past determinations in carrying out its duties and responsibilities, it must also consider the changes in the industry and that the functions of various job classifications change accordingly.

United Air Lines, Inc., NMB Case No. R-3806 (C-3461), Vol. 4, Determinations of Craft or Class of the National Mediation Board, p. 32 (1965).

These statements clearly reflect the Board's own views that it must apply general standards to individual cases in making craft or class determinations.

The two cases differ materially, then, since in *A.B.N.E.* only the sufficiency of the protections afforded to the carrier was being challenged, while in the case at bar the challenge involves a complete denial by the NMB of the carrier's due process rights. In view of this difference, the *A.B.N.E.* decision should not be applied to the instant case as if the two were identical.

IV. If the Court of Appeals Properly Interpreted the *A.B.N.E.* Decision, Then That Decision Should Be Reconsidered in Light of This Court's Other Due Process Decisions.

A. Congress Cannot Circumvent the Minimal Due Process Requirements of the Fifth Amendment by Legislative Action.

If the *A.B.N.E.* decision stands for the proposition ascribed to it by the Court of Appeals, that decision stands in conflict with this Court's other due process decisions. The language from *A.B.N.E.* quoted by the Court of Appeals refers to the fact that "the Act" (Railway Labor Act) does not require that the carrier be made a party to craft or class determinations and leaves to the NMB's discretion the extent to which, if any, a carrier will be allowed to participate. This Court, however, has repeatedly held that Congress is restricted by the due process requirements of the Fifth Amendment, even where it is exercising its plenary powers under another clause of the Constitution such as the Commerce Claus. *See, e.g., Greene* v. *McElroy, supra*; *Galvan* v. *Press*, 347 U.S. 522, 98 L.Ed. 911 (1953), *rehearing denied*, 348 U.S. 852, 99 L.Ed. 671. *See also U.S.* v. *Stoeco Homes, Inc.*, 498 F.2d 597 (3d Cir. 1974), *cert. denied*, 420 U.S. 927, 43 L.Ed. 2d 397.

Similarly, this Court has held that the fact that Congress prescribes a particular procedure to be followed does not automatically make that procedure "due process" as contemplated by the Constitution. This view was succinctly stated in *Den* v. *The Hoboken Land and Improvement Co., supra,* at 374:

> [t]he Constitution contains no description of those processes which it was intended to allow or forbid. It does not even declare what principles are to be applied to ascertain whether it be due process. It is manifest that it was not left to the legislative power to enact any process which might be devised. The article is a restraint on the legislative as well as on the executive and judicial powers of the government, and cannot be so construed as to leave Congress free to make any process "due process of law" by its mere will.

Thus, it is clear that the mere fact that the Railway Labor Act authorizes the use of certain procedures, vests some discretion in the NMB and does not expressly designate the carrier as a party cannot serve to justify the denial of due process to a carrier; nor can the Railway Labor Act itself prescribe the minimum due process requirements. Rather, the protections of due process come into play when the carrier's liberty and/or property are threatened, irrespective of the desires, intentions and expressions of Congress.

B. Whether the Protections of Due Process Attach to a Given Situation Does Not Depend Upon the Person's Statutory Designation As a "Party" to the Proceedings Which May Result in the Deprivation of His Life, Liberty or Property.

In the *A.B.N.E.* decision, this Court, in holding that no particular form of hearing was required for the NMB's proceedings in a representation dispute, construed the language of Section 2, Ninth of the Railway Labor Act as excluding carriers from "party" status in such proceedings.[9] As noted above, however, Congress cannot circumvent the requirements of due process by resorting to legislative device, *see, e.g., Den* v. *The Hoboken Land and Improvement Co., supra,* and consistent with this holding, it has been further held that Congress cannot circumvent due process by the expedient of withdrawing jurisdiction from every court in which suits for enforcement of constitutionally protected property rights can be brought. *Miller* v. *Howe Sound Min. Co.*, 77 F. Supp. 540, 545 (E.D. Wash. 1948). Yet this very situation results from the Court of Appeals decision, based on this Court's strict construction of the term "party" in *A.B.N.E.* If the decision below is allowed to stand, Congress has effectively circumvented due process by excluding persons with constitutionally protected rights and interests from "party" status in administrative proceedings, which are, or can be, determinative of those rights and interests, and by withholding jurisdiction from the courts to review the decisions rendered in such proceedings. *See, Switchmen's Union of North America* v. *NMB, supra.*

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9. The term "party" is not defined in the Railway Labor Act.

That due process protections cannot be dependent upon the statutory bestowal or withholding of "party" status is also evident when the effects of a decision to the contrary are examined. Were the right of Congress to dispense or withhold due process as it sees fit to be judicially recognized or sanctioned, the Due Process Clause would be gutted of all real substance and only the illusory protections of due process "when, if and as prescribed by Congress" would remain.

C. Section 2, Ninth of the Railway Labor Act Can Be Construed So As to Comport With the Due Process Requirements.

We submit that Section 2, Ninth of the Railway Labor Act can be construed so as to avoid the undesirable conclusion that Congress has enacted a procedure which denies due process of law to carriers subject to the Railway Labor Act. Such a construction is judicially preferred and would be in keeping with this Court's standing "assumption" that "[w]here administrative action has raised serious constitutional problems, . . . Congress . . . intended to afford those affected by the action the traditional safeguards of due process." *Greene* v. *McElroy, supra,* at 507.

Such a construction can be reached through a process which does no harm to the legitimate purposes of the Railway Labor Act. Initially, the phrase "consistent with due process requirements" or "consistent with the applicable constitutional safeguards" can be read into the statutory language, as such language should, in any event, be implicit in all Congressional actions involving a potential deprivation of life, liberty or property.

Moreover, the term "party," as used in the Railway Labor Act, need not be read in the strictest sense of

a "party" to litigation or administrative proceedings. Rather, a fairer reading would be that the term is only used to encompass more conveniently the various forms which employees' representatives may take (*e.g.*, individuals, associations, corporations, etc.). That is, the preferred reading would be that the term "party" is used to denominate collectively those entities which normally are on one side of the dispute.

In support of this reading of Section 2, Ninth, we point out that construing the word "party" in the strict sense has the untoward but logically necessary result of excluding, in addition to carriers, the very employees whose rights the Railway Labor Act is intended to protect.[10] Surely employees can and should be parties to a representation dispute involving them if they so desire. They are at the very heart of the representation dispute. If that is the case, then there are already "parties" to the dispute other than those statutorily denominated as such by Congress and the term as used therein must be intended to be read in a sense other than the strictest sense of a "party" to an administrative proceeding.

CONCLUSION

For the foregoing reasons, the Commuter Airline Association of America as Amicus Curiae urges the Supreme Court to grant SMB's petition and to decide the extent to which air carriers are entitled to procedural due process

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10. This Court recognized this dilemma in *A.B.N.E.*, but did not have to resolve it because, as was noted, no issue concerning the "party" status of employees was presented to it for decision. *A.B.N.E., supra,* at 660.

of law in representation dispute proceedings determinative of their liberty and property rights.

Dated July 29, 1978.

Respectfully submitted,

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APPENDIX

Relevant Stautory Provisions

45 U.S.C. §152

Seventh. No carrier, its officers, or agents shall change the rates of pay, rules, or working conditions of its employees, as a class, as embodied in agreements except in the manner prescribed in such agreements or in section 156 of this title.

* * * *

Ninth. If any dispute shall arise among a carrier's employees as to who are the representatives of such employees designated and authorized in accordance with the requirements of this chapter, it shall be the duty of the Mediation Board, upon request of either party to the dispute, to investigate such dispute and to certify to both parties, in writing, within 30 days after the receipt of the invocation of its services, the name or names of the individuals or organizations that have been designated and authorized to represent the employees involved in the dispute, and certify the same to the carrier. Upon receipt of such certification the carrier shall treat with the representative so certified as the representative of the craft or class for the purposes of this chapter. In such an investigation, the Mediation Board shall be authorized to take a secret ballot of the employees involved, or to utilize any other appropriate method of ascertaining the name of their duly designated and authorized representatives in such manner as shall insure the choice of representatives by the employees without interference, influence, or coercion exercised by the carrier. In the conduct of any election for the purposes herein indicated the Board shall

designate who may participate in the election and establish the rules to govern the election, or may appoint a committee of three neutral persons who after hearing shall within ten days designate the employees who may participate in the election. The Board shall have access to and have power to make copies of the books and the records of the carriers to obtain and utilize such information as may be deemed necessary by it to carry out the purposes and provisions of this paragraph.

Tenth. The willful failure or refusal of any carrier its officers or agents, to comply with the terms of the third, fourth, fifth, seventh, or eighth paragraph of this section shall be a misdemeanor, and upon conviction thereof the carrier, officer, or agent offending shall be subject to a fine of not less than $1,000.00, nor more than $20,000.00 or imprisonment for not more than six months or both fine and imprisonment, for each offense, and each day during which such carrier, officer, or agent shall willfully fail or refuse to comply with the terms of the said paragraphs of this section shall constitute a separate offense. It shall be the duty of any United States attorney to whom any duly designated representative of a carrier's employees may apply to institute in the proper court and to prosecute under the direction of the Attorney General of the United States, all necessary proceedings for the enforcement of the provisions of this section, and for the punishment of all violations thereof and the costs and expenses of such prosecution shall be paid out of the appropriation for expenses of the courts of the United States: Provided That Nothing In This Chapter Shall Be Construed To Require An Individual Employee To Render Labor or Service Without His Consent, Nor Shall Anything In This Chapter Be Construed to Make The Quitting of His Labor By An Individual Employee An Illegal Act;

Nor Shall Any Court Issue Any Process To Compel the Performance By An Individual Employee of Such Labor or Service, Without His Consent.

45 U.S.C. §156

Carriers and representatives of the employees shall give at least 30 day's written notice of an intended change in agreements affecting rates of pay, rules, or working conditions, and the time and place for the beginning of conference between the representatives of the parties interested in such intended changes shall be agreed upon within ten days after the receipt of said notice, and said time shall be within the 30 days provided in the notice. In every case where such notice of intended change has been given, or conferences are being held with reference thereto, or the services of the Mediation Board had been requested by either party, or said Board has proffered its services, rates of pay, rules or working conditions shall not be altered by the carrier until the controversy has been finally acted upon, as required by §155 of this title, by the Mediation Board, unless a period of 10 days has elapsed after termination of conferences without request for or proffer of the services of the Mediation Board.

45 U.S.C. §182

The duties, requirements, penalties, benefits, and privileges prescribed and established by the provisions of sections 151 to 152 and 154 to 163 or this title shall apply to said carriers by air and their employees in the same manner and to the same extent as though such carriers and their employees were specifically included within the definition of "carrier" and "employee", respectively, in section 151 of this title.